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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. BARRY BERNARD WHITE, JR., Defendant and Appellant.	A153329 (San Francisco City & County Super. Ct. No. 15001271)

A jury found defendant Barry Bernard White, Jr., guilty of two counts of first degree murder, seven counts of attempted premeditated murder, and six counts of assault with a firearm on a peace officer. On appeal, defendant contends the trial court erred by failing to instruct the jury on unconsciousness as a defense to the charged crimes and failing to inquire with a juror whether a note regarding an alleged sexist remark by defense counsel rendered the juror biased. Defendant also contends insufficient evidence supported three of the attempted murder charges, asks us to independently review the sealed transcript and records of a *Pitchess*[1] hearing, and argues cumulative error prejudiced him, rendering the trial fundamentally unfair. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 15, 2015, a grand jury indicted defendant on 16 felonies, including two counts of first degree murder (Pen. Code,[2] § 187, subd. (a); counts I & II), seven

[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

[2] All statutory references are to the Penal Code unless otherwise indicated.

counts of premeditated attempted murder (§§ 664, 187, subd. (a); counts III–IX), and six counts of assault with a firearm on a peace officer (§ 245, subd. (d)(1); counts XI–XVI). The indictment alleged a multiple murder special circumstance as to the first degree murder charges (§ 190.2, subd. (a)(3); counts I & II) and a separate count of possession of an assault weapon, an AK-47 assault rifle (§ 30605, subd. (a), count X). The indictment also alleged enhancements for personal use of a deadly weapon, a knife (§ 12022, subd. (b)(1); counts I–III), personal use of a deadly weapon, a handgun (§ 12022, subd. (b)(1); count II), personal and intentional discharge of a firearm, a handgun, causing great bodily injury and/or death (§§ 12022.7, 12022.53, subd. (d); counts I–III), infliction of great bodily injury (§ 12022.7, subd. (a); count III), personal and intentional discharge of a firearm, a handgun (§ 12022.53, subd. (c); counts IV–IX, XI–XVI), and personal use of a firearm, a handgun (§ 12022.5, subd. (a); counts XI–XVI). All counts, except the assault weapon charge, alleged defendant committed the offenses while on bail. (§ 12022.1, subd. (b); counts I–IX, XI–XVI.)

Defendant was found competent to stand trial,[3] and a jury trial commenced in May 2017.

A. *Prosecution Case*

1. *Events at the Jewelry Store*

For approximately 26 years, Victor H. owned a jewelry store on the basement level of the San Francisco Gift Center & Jewelry Mart (Jewelry Mart) at 888 Brannan Street in San Francisco, which specialized in the sale of gold jewelry. Lina L. and K.M., Victor's sales assistants, were long-time employees.[4]

In May 2013, defendant bought a 24-inch, 14-karat gold chain from Victor. Defendant paid $5,573.43 for the chain, which as advertised, should have weighed 94.5 grams. It turned out to weigh between 84 and 85 grams. Lina told Victor that defendant

[3] In January 2017, defendant entered a plea of not guilty by reason of insanity, which he subsequently withdrew.

[4] For ease of reference we hereafter refer to the victims and witnesses by their first names. We mean no disrespect by doing so.

was not happy, and Victor told her to call the customer back to set up a meeting to resolve the issue immediately.

After speaking with Lina and K.M., Victor decided to give defendant $700 back. When defendant came to the jewelry store for the meeting, Victor offered him "close" to $700, but defendant asked for $1,000. After discussing for approximately a half hour, defendant left the store, saying in an angry tone, "I will make you pay," or "I will make you guys pay." Victor thought defendant meant he would sue them. Victor told Lina and K.M. that if defendant returned to the store, they should give him $700 to $800 to resolve the issue and did not need his approval to issue a refund.

On July 12, 2013, defendant returned to the jewelry store. Defendant drove his car to the Jewelry Mart, parked at a meter outside the building, and went inside. Victor was happy to see him because he believed he could resolve the issue. He asked defendant to wait until he finished with two customers. Defendant told Victor he could not wait because he was parked "right outside." Victor gave defendant five quarters and told him to go feed his meter. Defendant left and returned a few minutes later. A customer who was in the jewelry store at the time said defendant was "calm, quiet," whereas he had been agitated when he first came in. Victor asked him to wait a little longer and offered him a glass of water. Defendant refused the water, but said he would wait.

About 20 minutes later, after the other customers left, Victor called defendant to the counter. He told defendant he wanted to return $700 to him. Defendant said he wanted $1,000. At that point, defendant shot Victor with a gun twice in his upper chest and once in his face, next to his left nostril. Victor believed he crawled to the back office after that. He heard Lina say, "Boss, you're injured."

Victor was lying on the floor, when he saw defendant grab Lina from behind and use a knife to cut her neck. Defendant then used the knife to try to slice Victor's neck open. Victor tried to resist by holding the blade of the knife and kicking defendant. Defendant stood up and walked off.

Victor's whole body was covered with blood. He tried to get up, then felt his cell phone against his back, and called for help. After speaking with his daughter and asking

her to call 911, he managed to get to the front of the store where he saw K.M. lying on the ground in a pool of blood.

Officer Timothy Neves and his partner responded to a call involving shots fired at the Jewelry Mart. Other officers had already arrived. Neves and his partner followed a blood trail from the stairs down to the basement level. When they reached the end of the hall, they heard moaning, as if someone had been severely injured. Inside the jewelry store, a man was lying hunched on a glass countertop, bleeding. A female was lying face down on the carpet in the middle of the store, unresponsive. In the back room, Neves saw another woman lying face down and blood on the carpet. He checked on her, but she did not have a pulse. When the officer rolled her over, he observed her neck had been deeply sliced and she was dead. The woman lying on the carpet in the front area of the store also had her throat slit.

Police retrieved video footage from several surveillance cameras, excerpts of which were shown to the jury. The videos show defendant enter the jewelry shop, talk to Victor, receive something from him (presumably money for the parking meter), leave the store and return approximately three minutes later, defendant waiting for 20 minutes seated on a stool near a counter while Victor and his assistants helped other customers, defendant approaching Victor after the customers left, defendant talking with Victor briefly, defendant pulling a handgun from his pocket, shooting Victor several times and Lina once, turning, walking toward, and shooting K.M., removing a knife from his other pocket and slashing K.M's throat, entering the back of the store where Victor and Lina had gone, defendant making another slashing motion, and emerging a minute later, covered in blood. Defendant retrieved his revolver from the floor near K.M. and was holding it in his hands as he walked out of the store.

2. *Witnesses See Defendant Leave the Jewelry Mart*

That afternoon, coworkers Joseph Z. and Ellie T. were walking through the Jewelry Mart entrance. As they headed down the stairs, they noticed a man walking up the stairs. He was African-American and had a stocky build. His shirt appeared dirty, but Joseph later realized it was blood, not dirt, on the man's shirt. Ellie noticed

immediately he was "covered in blood." They saw the man loading bullets into an open revolver as he walked up the stairs. Both Joseph and Ellie observed he was walking "very calmly" and was "incredibly" calm. He did not say anything or make eye contact. Joseph did not process what he had just seen until he reached the bottom of the stairs.

A security guard and two receptionists were working the front desk at 888 Brannan that afternoon. A security guard testified that a downstairs tenant came up and told him to call the police because there had been a shooting downstairs. The security guard was unable to reach 911, but eventually heard sirens, so he knew police were on their way. Then he saw a man, whom he identified at trial as defendant, coming up the stairs with blood on his shirt and an open revolver in his hand. Defendant was loading the gun and did not say anything. One of the receptionists testified she received a call stating there had been a shooting downstairs. She was about to call the management office when she, too, saw a man walking up the stairs wearing a white shirt spattered with what she thought was blood, walking calmly and loading a gun. He walked past her and went out the exit door. After he left, she heard about three gunshots. The other receptionist was walking through the lobby when she saw an African-American man with a husky build walk by her. He had blood on the front of his shirt, was holding something, and was walking at a normal pace.

3. *Events at the Taqueria Adjacent to Jewelry Mart*

Three police officers, Captain Timothy Oberzeir, Lieutenant David Johnson, and Sergeant Walter Ware, were driving in Oberzeir's car when they received a radio call about shots being fired at 888 Brannan Street. They drove to the building. As they approached, Sergeant Ware saw defendant on the sidewalk between a taqueria and 888 Brannan Street, walking at "just slightly slower than a regular pace" with blood on his clothing, hands, and arms. Oberzeir stopped the car and the three officers got out.

At first, Oberzeir thought defendant was a victim who had been hit by gunfire. From 15 or 20 feet away, Ware and Oberzeir asked defendant if he was hurt or needed help; Johnson asked him what was going on. Oberzeir testified defendant did not appear to be aware of their presence initially. He turned, stared in their direction, and said,

"yeah." Oberzeir found the response "very odd" from a potential victim. Johnson and Ware testified defendant did not respond verbally at all. Ware said defendant had "a blank stare"; Johnson said he had a "glazed look." Johnson thought that was unusual. He said defendant seemed a "little bit out of it," "wasn't quite there," and appeared to be "dazed, in a fog." Defendant seemed to be thinking about something else and not listening to or obeying commands. He seemed shocked to see the officers and was furtive in his movements.

The three officers then drew their firearms, formed a semi-circle around defendant, pointed their guns, and told him to get on the ground. Defendant initially complied by raising his hands, then began to "scan" (with his eyes) the officers surrounding him. He started crouching down with his hands raised, then immediately stopped, turned around, and ran into the taqueria. Video footage shows defendant entered the taqueria, ran toward the cash register directly across from the door, and jumped over the counter behind the register.

The three officers followed defendant, with Ware and Johnson ahead of Oberzeir. Ware and Johnson ran to the doorway of the taqueria and broke left positioning themselves in an adjacent loading dock; Oberzeir was at the curb about 23 feet from the entrance to the taqueria. Ware believed defendant was armed and called out "gun"; Oberzeir radioed an alert that defendant may have a gun. From behind the restaurant counter, defendant extended his arm and fired directly at Oberzeir. Oberzeir was afraid for his life and the lives of those around him. Within seconds of being fired upon, Oberzeir radioed that shots had been fired. After a pause, Johnson then heard four or five more shots. He felt threatened by the shots and believed his life was in danger. Ware also testified he was afraid for his life and those of his fellow officers and the people in the taqueria. Video footage appears to show defendant firing the gun from behind the counter, waiting behind the counter approximately 30 seconds while watching the door, then walking to the middle of the restaurant with gun pointed down, and then raising the gun and firing several more shots from the taqueria doorway.

About 30 seconds after defendant shot at Oberzeir, other police cars arrived. One of the cars was driven by Sergeant Ron Liberta; another car, driven by Officer Chris Costa with Officer Cody Barnes in the passenger seat, was directly behind Liberta's vehicle. Liberta testified he drove to the taqueria because he heard two calls over the radio about shots being fired. Liberta saw defendant in the taqueria doorway with a gun in his right hand, pointed down toward the head of an officer sheltering behind an unmarked police car. Defendant and Liberta made eye contact. Defendant took a step forward towards Liberta, raised the gun up, pointed it at Liberta, and began firing at him. As defendant fired, Liberta drove past him and defendant continued to track him and kept firing. Liberta heard three or four shots. He feared for his life and the other officers. Liberta stopped his car, got out and approached the entrance to the taqueria, where he saw defendant being handcuffed. Liberta testified there were no bullet holes in his car, but there were bullet holes in the building behind where he had driven his car.

As Officers Barnes and Costa drove east down Brannan Street, they heard multiple gunshots being fired. As they drove forward, Barnes and Costa saw defendant standing on the sidewalk in front of the taqueria wearing a shirt covered in blood and holding a gun in his hands. They saw him with his arm fully extended and a gun in his hand, tracking Liberta's vehicle, shooting. Barnes heard more than one gunshot. Barnes then saw defendant aim his gun at Barnes and Costa, tracking their movement from about 15 yards away. Barnes ducked his head and again heard more than one gunshot, but did not know how many. Costa testified after defendant swung his gun toward them, he fired at least one shot. When defendant fired his gun, Costa was in the driver's seat and Barnes was in the passenger seat, about 15 to 20 yards from the gun barrel. Costa stopped the car 15 or 20 yards past the taqueria, jumped out, drew his gun, and aimed at defendant. Defendant put his hands up, went face down on the sidewalk, and surrendered. There were no bullet strikes on the police vehicle, but Costa noted there were bullet strikes in the building directly across from their vehicle.

Officers handcuffed and searched defendant. In one of the pockets of his shorts was a four-inch folding pocket knife covered in blood. Defendant had cuts on both his

hands. Defendant did not appear to be under the influence of any substance or alcohol. His demeanor was very calm and was cooperative when given simple commands.

4. *Defendant's Medical Treatment*

A fire department medic responding to the scene found defendant handcuffed and prone on the ground. He noted defendant had lacerations on his left hand, minor scratches on his forearms, and abrasions to his chin. Defendant had no loss of consciousness and his vital signs were normal. The paramedic who examined him reported, "patient completely stable," meaning he was awake and had good vital signs. Defendant was quiet and responded to questioning about his physical condition with a shake of his head, yes or no.

Defendant was transported to the hospital. There, a nurse examined his injuries. Defendant told her: "I was playing with a knife and cut myself. I don't know what happened. It was an accident. I don't want to talk about it." Defendant reported no loss of consciousness, denied hearing voices, and had no suicidal ideation or homicidal ideation. She also noted defendant was anxious.

5. *Police Investigation*

Inspector Philpott interviewed defendant about six hours after the incident. He described defendant's demeanor as "lucid, calm, alert, clear, coherent." He agreed defendant was very quiet. Inspector Philpott did not think defendant "seem[ed] like the type."

An investigator searched defendant's vehicle. She located an empty pistol holster in the rear pocket of the front passenger seat. She also found a pair of jeans that had an AK-47-type assault rifle secreted into the waistband and through the leg of the jeans. In the pocket of the jeans was a box magazine compatible with the AK-47-type rifle that held 30 rounds of ammunition. The rifle was not loaded, but when tested it was found to be operable.

Defendant's neighbor, Shawn B., was also interviewed by an inspector. When called as a witness at trial, Shawn B. testified that he lived about a block from defendant and had brief contact with him over the years. In June or July 2013, Shawn B. was at a

nearby park with his son when he saw defendant playing basketball by himself in athletic gear and wearing various weights on his body. Shawn B. thought he might be training to play basketball in college, and asked defendant if he was "getting ready to go play somewhere." Defendant responded, "[N]o, I'm getting ready for war." His tone was very direct and stern, his demeanor was serious, and Shawn B. found the comment very odd. Within a few weeks or a month, Shawn B. heard from a group of neighbors about the July 12, 2013 incident involving defendant.

B. ***Defense Case***

1. ***Defendant's 2009 Head Injury***

When he was 19 years old, defendant was shot in the back over the left scapula and in the scalp near his right ear. A paramedic who treated defendant testified he was alert after he was shot and his level of distress was moderate, not life threatening. He had a penetrating wound in the left occipital region.

Defendant was taken to a trauma center where a trauma surgeon removed bullet fragments from his scalp. The surgeon testified defendant was bleeding copiously, but the bullet fragments did not enter the brain. A CT scan showed some soft tissue swelling and some retained metal fragments. The CT scan report also noted defendant had a disconjugate gaze, meaning his eyes were not looking consistently with one another at the same target. The surgeon testified a disconjugate gaze may be consistent with a number of conditions, including a traumatic brain injury—an injury significant enough to change a person's consciousness for some period of time. But in defendant's case, the surgeon did not know whether the disconjugate gaze was a preexisting condition, and he testified he "would be really surprised" if it resulted from the 2009 gunshot wound because the injury was not severe enough. The surgeon opined it was "extremely unlikely" defendant suffered any permanent disability from these gunshot wounds. Defendant did not have any injury to the skull or intracranial structures—it was a soft tissue injury. There was no

indication there was any injury to defendant's brain that would affect his ability to function.

2. *Defendant's Family and Coworkers*

Several relatives and coworkers testified defendant changed after he was shot in the head. His aunt, who also worked with him, testified he was very quiet and had no behavior problems at work before the shooting, but was even quieter, withdrawn, and would sometimes "space out" after the shooting. Another coworker testified that before he was shot, defendant would often have conversations like a normal teenager, but afterwards he was less talkative and quieter, at times sitting in a corner "spacin' out." One of defendant's former supervisors and a family friend said after 2009 he was "[q]uite different" and would be a "in a zone," "like a walkin' zombie." She said defendant was "dazed," like he was "there but not there." Still another former colleague said defendant "was always shy and kept to himself about everything but it was easier to talk to him" before the 2009 incident. After he was shot he was "really quiet and reserved," always "in his own little world," and "super depressed, . . . as if he was turned down for a prom date or something."

Another former colleague said defendant was always in a good mood and light-hearted before the shooting but was very withdrawn and unmotivated after. Based on multiple conversations she had with him, she did not think he expected to be living much longer. Defendant began acting more normally in late 2012 and seemed more talkative, laughing and joking with his coworkers. In 2013, he showed her a gold necklace and told her he had been cheated. He said, "You see this shit, this is not what I paid for. They played me." He seemed very irritated and could not let it go.

A doctor who worked with defendant when he was a student and full-time employee testified that prior to being shot, defendant was quiet and introverted and there was no significant change to his demeanor after the shooting; he was always quiet and shy. Defendant showed the doctor a gold necklace online that he wanted to buy. Once defendant got the necklace, he was not happy with it. Another former colleague testified defendant was always quiet, did not initiate conversation, and mumbled when speaking.

3. *Evidence of Defendant's Mental Condition*

At trial, numerous experts testified about defendant's medical condition. Neuropsychologist Christine Naber testified for the defense. Dr. Naber performed psychological testing on defendant in September 2011 for purposes of a forensic evaluation. Defendant reported he was "going in and out of consciousness" after he was shot. Based on her testing, Dr. Naber concluded he suffered from posttraumatic stress disorder (PTSD) in 2011. Dr. Naber testified PTSD can affect a person's memory, attention, concentration, executive functioning, and impulse control, but agreed PTSD would not typically interfere with planning or execution of behavior. Dr. Naber found no evidence of brain injury or neuropsychological damage based on defendant's medical records and her examination. He had a normal CT scan, achieved a perfect score on a test that measured potential head trauma, and there was no evidence he had any neurologic compromise, brain injury, or cognitive disorder.

Mark Greenberg, another expert in neuropsychology, opined defendant has frontal lobe dysfunction with a moderate degree of severity, a mental defect consistent with frontal lobe syndrome. Dr. Greenberg testified frontal lobe syndrome is a complex and characteristic pattern of impairment that involves changes in personality, behavior, attention, and arousal, and can cause problems with primary motor function, ability to control movement, reasoning, awareness, and picking up on social cues. Dr. Greenberg opined the mental defect preexisted the 2009 injury but he was not certain if defendant was born with the condition or acquired it later in life.

Neuropsychiatrist and defense expert James Merikangas interviewed and conducted a physical examination on defendant in December 2016. Dr. Merikangas also diagnosed defendant with frontal lobe syndrome, and explained the frontal lobe can affect functions having to do with personality including: impulse control, mood affect, attention, problem solving, judgment, and abstract thinking. He did not believe defendant went to the jewelry store on July 12, 2013 planning to shoot someone and believed defendant's actions after he was rebuffed by Victor "were not very well planned." Dr. Merikangas opined defendant is not good at planning, has poor judgment, and his actions

were the result of a mental defect. He agreed, however, that despite frontal lobe syndrome, defendant was able to engage in goal-directed behavior, and exact revenge and retaliation. The frontal lobe syndrome did not make him delusional.

C. *Prosecution Rebuttal*

1. *Evidence of Defendant's Mental Condition*

Forensic psychologist Lisa Jeko interviewed and tested defendant in April 2017. Dr. Jeko diagnosed defendant with major depressive disorder recurrent and avoidant personality disorder. Avoidant personality disorder is characterized by someone who socially isolates, has profound feelings of inadequacy, and hypersensitivity to negative evaluation. Defendant's ability to plan was not hindered by the diagnosis and he was able to engage in goal-directed behavior. After reviewing surveillance videos from this case, Dr. Jeko concluded defendant's acts were consistent with someone who was *not* suffering from PTSD or frontal lobe syndrome.

Psychologist Ronald Roberts performed a neuropsychological evaluation of defendant in March 2017 and diagnosed defendant with antisocial personality disorder, which is a disorder of behavior and conduct, not a brain impairment. Dr. Roberts testified he based his diagnosis on defendant's pervasive pattern of disregard and violation of the rights of others from a young age, and he did not believe defendant's behavioral problems resulted from his head injury in 2009. He testified even if defendant suffered a mild traumatic brain injury, he would have been expected to recover within a matter of weeks or months.

Clinical social worker Karen Case met with defendant in March 2010 at Kaiser Hospital. Defendant told Case the police were evil; he described himself as a victim of police brutality and said the police were always after him and planned to hurt and persecute him. He made a general statement about getting revenge against the police. In a first assessment, Case diagnosed defendant with antisocial personality disorder.

Forensic psychologist John Greene examined defendant in April 2017. He diagnosed defendant with antisocial personality disorder. He did not agree defendant suffered from PTSD or frontal lobe syndrome. He testified if a person had trouble

controlling their behavior due to mental illness or impairment, there would be a pattern of severe behavior and it would not be preceded and followed by long-term patterns of stability.

A neuroradiologist, William Dillon, reviewed defendant's CT scan from August 2009 and an MRI taken in January 2017. Dr. Dillon testified the 2009 CT scan showed a soft tissue injury to the scalp and no injury to the skull or brain; the 2017 MRI showed no evidence of brain damage, stroke, or hemorrhage. Dr. Dillon opined defendant's brain appeared normal.

2. *Defendant's Coworkers*

Two of defendant's former coworkers also testified in the prosecution's rebuttal case. One had known defendant for seven years and said in the time he had known defendant, his demeanor did not change—he was quiet, reserved, solemn, and introverted. Defendant did not have a good relationship with his coworkers, was "[v]ery anti-police," and pessimistic about living beyond age 30. Defendant told the coworker he was cheated when he purchased a gold necklace. When the coworker suggested he talk to the manager, contact the Better Business Bureau, or go to small claims court, defendant said he would "handle it in his own way." Another former coworker said after the shooting in 2009, defendant was "kind of" withdrawn and quiet at work. Defendant talked with this coworker and showed him a gold necklace in the summer of 2013. He was not happy with it because he thought it would be more solid and it was "hollowed out" in the back. He said he went back to the store and the employees "blew him off" and did not care.

D. *The Verdict and Sentencing*

After deliberating less than six hours, the jury found defendant guilty of all offenses. On January 3, 2018, the trial court sentenced defendant to two consecutive terms of life in prison without the possibility of parole (counts I & II), one consecutive term of life with the possibility of parole (count III), 140 years to life consecutive (counts II-IX), another 123 years consecutive (counts I–IX), and a further three years (count X). Defendant timely appealed.

II. DISCUSSION

A. *Unconsciousness Defense*

In a pretrial motion, defendant asked the court to instruct the jury on unconsciousness as a complete defense to the charges. After the close of evidence, defendant renewed his request for an instruction on unconsciousness, asking the court to give the jury CALCRIM No. 3425.[5] The court denied the request on the ground there was no substantial evidence to support the instruction, specifically noting there was no expert evidence that frontal lobe syndrome or PTSD could have caused defendant to be unaware of his actions or to have acted in an unconscious state. Defendant asserts the trial court committed reversible error by refusing to give the instruction.

"In general, a trial court must give a requested jury instruction if there is substantial evidence in the record supporting such an instruction." (*People v. Mitchell* (2019) 7 Cal.5th 561, 583.) Substantial evidence in this context is "evidence sufficient for a reasonable jury to find in favor of the defendant." (*People v. Salas* (2006) 37 Cal.4th 967, 982.) " 'In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether "there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt . . . ." ' " (*Mitchell*, at p. 583, quoting *Salas*, at p. 982.) " 'On

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[5] CALCRIM No. 3425 on unconsciousness reads as follows:

"The defendant is not guilty of _____ <*insert crime[s]*> if (he/she) acted while unconscious. Someone is unconscious when he or she is not conscious of his or her actions. [Someone may be unconscious even though able to move.]

"Unconsciousness may be caused by (a blackout[,]/[or] and epileptic seizure[,]/[or] involuntary intoxication[,]/[or] _____ <*insert a similar condition*>).

". . .

"The People must prove beyond a reasonable doubt that the defendant was conscious when (he/she) acted. If there is proof beyond a reasonable doubt that the defendant acted as if (he/she) were conscious, you should conclude that (he/she) was conscious, unless based on all the evidence, you have a reasonable doubt that (he/she) was conscious, in which case you must find (him/her) not guilty."

appeal, we likewise ask only whether the requested instruction was supported by substantial evidence—evidence that, if believed by a rational jury, would have raised a reasonable doubt as to' an element of the crime in question." (*Mitchell*, at p. 583.) " ' " 'Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused.' " ' " (*People v. Cole* (2007) 156 Cal.App.4th 452, 484.)

" 'Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge.' [Citations.] 'If the defense presents *substantial evidence* of unconsciousness, the trial court errs in refusing to instruct on its effect as a complete defense.' " (*People v. Parker* (2017) 2 Cal.5th 1184, 1223, italics added by *Parker*; § 26; *People v. Halvorsen* (2007) 42 Cal.4th 379, 417.) " 'Unconsciousness for this purpose need not mean that the actor lies still and unresponsive . . . . Thus unconsciousness " 'can exist . . . where the subject physically acts in fact but is not, at the time, conscious of acting.' " ' " (*People v. Gana* (2015) 236 Cal.App.4th 598, 609 (*Gana*).)

Defendant contends substantial evidence presented at trial, including testimony from 11 prosecution witnesses regarding defendant's demeanor and behavior, as well as the testimony from the trauma surgeon who treated Victor and the defense expert opinion of Dr. Naber, required the trial court to give his requested jury instruction on unconsciousness.

We are not persuaded the evidence cited by defendant is substantial evidence defendant acted in an unconscious state. The fact that witnesses almost universally observed defendant was "calm" (and even "very incredibly calm[]") as he waited for Victor and then later as he exited the Jewelry Mart building while reloading a revolver does not suggest he was unaware of his actions as opposed to carrying out acts of violence in a cold, calculated manner. The fact that police officers testified defendant did not appear to be aware of their presence *initially* and seemed "dazed" or "in a fog" when they first approached him does not show he was unaware of his actions when he put up his hands in response to a command, turned abruptly and ran into the taqueria, took shelter behind a counter, drew a weapon, waited, and then came to the doorway, shooting

directly at officers. Defendant's self-serving statement to an emergency room nurse on July 12, 2013 that he did not know what happened, it was an accident, and he did not want to talk about it, does not, without more, suggest he was unaware of what he had done.

Defendant also cites to testimony of Dr. Andre Campbell and Dr. Christine Naber to argue the trial court should have given an unconsciousness instruction. Dr. Campbell, the trauma surgeon who treated Victor H. (the victim) on July 12, 2013, testified *hypothetically* a 19 year old who had been shot "could" suffer from PTSD, but said nothing about defendant or whether he was acting in an unconscious state. Dr. Naber, a defense expert, testified she was certain defendant had PTSD in 2011, but she did not testify that he was unaware of his actions on July 12, 2013. Defendant also relies on Dr. Naber's testimony that a person with executive dysfunction may not be *consciously* lying when explaining to medical staff how injuries were contracted, but whether defendant was conscious of not telling the truth when he spoke to the emergency room nurse in the hospital is different than being unaware of his actions during the crimes.

This case stands in marked contrast to *People v. James* (2015) 238 Cal.App.4th 794 (*James*), relied upon by defendant, in which the court concluded substantial evidence supported an instruction on unconsciousness. In *James*, the court found "ample evidence" that the defendant was unaware of his actions and acted in an unconscious state because he was attempting to climb the exterior of the building, running around the parking lot " 'crashing his head into cars and garbage cans,' " never responded to commands from police officers, and was mumbling incoherently. (*Id.* at pp. 809–810.) An expert witness testified the defendant had suffered from a seizure disorder since age 17, was experiencing a severe psychotic episode *at the time*, and " 'did not have an awareness of what took place' " during the incident. (*Id.* at pp. 801, 810.) Here, by contrast, evidence showed defendant acting in a calculated and deliberate manner and taking purposeful action in response to events. He patiently waited for Victor, engaged with him in conversation, shot him and sliced the throats of his assistants, and then calmly exited the building. Though officers said defendant appeared not to be aware of

their presence initially and was acting strangely, when they told him to get on the ground, he raised his hands, began to crouch, and then took off running into the taqueria. And while expert witnesses testified to a variety of mental impairments, diagnoses, and personality disorders, *none* of them testified his mental state made him unaware of his actions on the afternoon of July 12, 2013.

Even if there was substantial evidence of unconsciousness, however, we would conclude the error "was harmless by any applicable standard."[6] (*People v. Boyer* (2006) 38 Cal.4th 412, 470 [addressing trial court's refusal to instruct on unconsciousness as complete defense].)

First, "The absence of an instruction on a defense is not prejudicial if ' "the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions. In such cases the issue should not be deemed to have been removed from the jury's consideration since it has been resolved in another context, and there can be no prejudice to the defendant since the evidence that would support a finding [favorable to the defendant] has been rejected by the jury." ' " (*Gana*, *supra*, 236 Cal.App.4th at p. 610; *People v. Wright* (2006) 40 Cal.4th 81, 98–99 [trial court's error in failing to provide required instruction was harmless under either *People v. Watson* (1956) 46 Cal.2d 818, 836 or *Chapman v. California* (1967) 386 U.S. 18, 24, where there was evidence factual question posed by omitted instruction was necessarily resolved adversely to defendant under other proper instructions].)

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[6] We reject defendant's contention the error is a constitutional due process error and thus reversible per se. Defendant relies on *People v. Newton* (1970) 8 Cal.App.3d 359, but that case is inapposite. In *Newton*, the record did not show the jury necessarily decided the factual question posed by an unconsciousness instruction against the defendant, but suggested the jury accepted the defendant's diminished capacity defense because it convicted him of manslaughter as a lesser included offense of murder. (*Id.* at p. 378.) Here, as we discuss further below, the jury necessarily decided the factual question posed by the omitted unconsciousness instruction when it found defendant acted deliberately, with premeditation, and with intent to kill despite expert evidence regarding his mental condition and an instruction that such evidence could support a defense.

In *Gana*, the trial court improperly failed to instruct the jury on the affirmative defense of unconsciousness in a case in which a woman had fatally shot her husband. The defendant did not recall the events of the crime, and medical experts testified that medications she had been taking to combat cancer and overcome the effects of chemotherapy left her experiencing " 'a delirium, which is a kind of fluctuating level of consciousness, due to medical illness.' " (*Gana*, *supra*, 236 Cal.App.4th at pp. 609–610.) Nonetheless, the appellate court concluded the error was harmless because the defendant was able to use the same underlying facts to mitigate the crimes. (*Id.* at p. 610.) The trial court instructed the jury it could consider the evidence of mental disease, defect, or disorder in determining whether the defendant had the requisite intent. As to the murder charge, the jury was also given the option of convicting the defendant of the lesser included offense of second degree murder. (*Ibid.*) Because the jury clearly " 'rejected defendant's [mental state] defense' [citation] in another context . . . the refusal to instruct on unconsciousness was harmless error." (*Id.* at p. 611.)

Here, the jury was also given the opportunity to consider defendant's mental state defense. No less than seven experts testified to evidence of defendant's mental state and whether he had a mental defect, illness, or impairment that affected his intent to commit the charged crimes. The trial court instructed the jury they could consider the evidence of defendant's "mental disease, or defect, or disorder" in determining whether defendant acted with the requisite intent or mental state with respect to the charged crimes. The jury swiftly and unanimously rejected the defense and concluded defendant acted willfully, and with deliberation and premeditation. And, as in *Gana*, the jury did not reduce the first degree murder charges based on an absence of intent.

Second, the evidence overwhelmingly showed defendant planned and deliberately carried out the offenses and adjusted his actions in response to changes in circumstances. Defendant complained to a number of witnesses that he felt he had been cheated on the gold necklace, told one he was "getting ready for war," told another he would handle the situation "in his own way," and told Victor on an earlier visit, "I will make you pay." He brought a loaded .38-caliber handgun, extra bullets, and a knife as a back-up weapon to

the jewelry store to use against his victims. He prepared an additional weapon, an operable AK-47-style assault rifle with 30 rounds of ammunition, hidden in a pair of jeans in his vehicle. He parked his car in front of the Jewelry Mart, put money in his parking meter, and calmly walked inside. When Victor asked him to wait as he was helping other customers, defendant expressed concern his car would be ticketed or towed and accepted change from Victor to put in the parking meter. He returned to his car, put more money in the meter, and went back to the jewelry store. He patiently sat and waited 20 minutes for other customers to leave the store before approaching Victor. He talked with Victor for approximately 30 seconds. He fired several shots at Victor and Lina, then turned, walked across the store, shot at K.M., then removed the knife from his other pocket and slit her throat. He turned back to pursue Lina and Victor in the back room, slit Lina's throat, and tried to slit Victor's. As he exited the building, he calmly reloaded his revolver. When confronted by the police, he feigned surrender, then turned and ran into the taqueria to evade capture. He came to the doorway of the store, pointed his weapon and tracked the location of police officers, and fired directly at them. Defendant's actions showed he was aware of his surroundings, reacted to changing circumstances, and knew what he was doing. (See, e.g., *People v. Halvorsen*, *supra*, 42 Cal.4th at p. 418 ["complicated and purposive nature of [defendant's] conduct in driving from place to place, aiming at his victims, and shooting them in vital areas of the body" suggested he was aware of his actions].)

Finally, the jury was also instructed that in order to find defendant guilty of violating section 12022.53, subdivisions (c) and (d), it must conclude that defendant intentionally discharged the gun. Thus, the jury necessarily concluded that defendant knew he was shooting the gun, both in the jewelry store and the taqueria, rejecting a finding that he did so unconsciously. On this record, we conclude any failure to instruct on unconsciousness was harmless error.

B. ***Juror Bias Based on Perceived Sexist Remark***

Defendant next contends the trial court's failure to inquire with a juror about a note she sent raising a concern that defense counsel made a "sexist" remark interfered with defendant's Sixth Amendment right to an impartial jury.

On June 21, 2017, after defense expert Dr. Greenberg finished testifying, the court excused the jury, then announced it had received a note from one of the jurors earlier in the day. The note said: "Please let counsel know that asking a female colleague to quote, 'calm down,' reads as sexist. This is not a question—a question for anyone, just a tip. It's very distracting." The court stated it had told counsel for both parties as soon as it received the note and read it to them. The court had no knowledge anyone, and particularly defense counsel, had used the words "calm down," to either his female colleague, or the prosecutor (who was female). The court did not know what the juror meant.

The court reporter apparently thought the juror misheard defense counsel's objection "Compound" to a lengthy question by the prosecutor as "calm down." Defense counsel said he mouthed "consciousness" at one point to his female colleague, indicating that she should look up consciousness material. He believed the juror may have misread that and thought he told her to calm down. His female colleague denied that defense counsel told her at any point to "calm down." Defense counsel then asked the court to bring the juror in to chambers to clarify that he never said, "calm down." He also expressed concern, given the juror's statement, that she "clearly" thought he was sexist. Defense counsel observed the case was "a double-homicide where two of the victims are female and the district attorney, who's charging this case, is a female."

The trial court refused to call the juror into chambers, finding it would be inappropriate for defense counsel to talk to her directly. The court also observed the note did not accuse defense counsel of being sexist, it said he made a remark that " 'reads as sexist.' " The trial court suggested the note was "softened" by saying it was a "tip." The court concluded the remark did not raise a substantial issue of bias or threat of prejudice to defendant or his counsel.

Upon a showing of good cause that a juror is unable to perform his or her duty, the trial court may discharge the juror at any time. (§ 1089; *People v. Lomax* (2010) 49 Cal.4th 530, 588.) But " 'not every incident involving a juror's conduct requires or warrants further investigation.' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 702 (*Fuiava*).) " ' "[A] hearing is required only where the court possesses information which, if proven to be true, would constitute 'good cause' to doubt a juror's ability to perform his duties and would justify his removal from the case." ' " (*Ibid.*) Like the ultimate decision to retain or discharge a juror, whether and to what extent to investigate alleged juror bias or misconduct is a discretionary decision by the trial court. We review that determination for an abuse of discretion. (*Ibid.*)

On this record, the trial court did not abuse its discretion in refusing to conduct a further inquiry of the juror. As the trial court correctly observed, the juror did not express an opinion that defense counsel was sexist, she commented a remark he made "read as sexist" and noted it was distracting. The fact she labeled the perceived comment "distracting" suggests she was focused on trying to understand the case and the misheard statement drew her attention away from that task momentarily, not that she was using the statement in her assessment of the case. Further, the fact that she framed her comment as a "tip" rather than "a question" suggests only that she hoped her note would cause the conduct to stop, not that she wanted to discuss it with the court.[7] Given that the juror did not alert the court to any further problems, and the record offers no indication that juror

[7] We also observe the trial court expressly instructed jurors not to let their feelings for the lawyers influence their decision in the case. Specifically, the court instructed jurors not to let "bias, sympathy, prejudice, or public opinion influence your decision. Bias includes but is not limited to bias for or against the witnesses, *attorneys*, defendant, or alleged victims based on . . . gender . . . ." (Italics added.) The court also told jurors, "Nothing that the attorneys say is evidence. . . . Only the witnesses' answers are evidence." We presume jurors follow instructions and, accordingly, in the absence of evidence in the record to the contrary, we assume the juror did not decide whether the prosecution had proven the charges beyond a reasonable doubt based on her feelings (if she had any) about defense counsel.

(or any other juror) was biased against the defense as a result, we find no abuse of discretion in the trial court's refusal to conduct further inquiry.

C. *Attempted Murder of Johnson, Ware, and Barnes*

Defendant next argues the evidence was insufficient to convict him of the attempted murder of Officers Johnson, Ware, and Barnes. We disagree.

In considering a challenge to the sufficiency of the evidence in a criminal case, " ' "we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." ' " (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1104.) Our role is a limited one—" ' "The proper test for determining a claim of insufficiency of the evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt." ' " (*People v. Smith* (2005) 37 Cal.4th 733, 738–739 (*Smith*).)

To prove a defendant is guilty of attempted murder, there must be sufficient evidence of a "specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) If a defendant is charged with multiple counts of attempted murder, his or her guilt must be determined separately for each victim. (*People v. Bland* (2002) 28 Cal.4th 313, 331.)

As to Officers Johnson and Ware, defendant contends there was insufficient evidence he attempted to murder them because they were never in his line of fire. According to the officers' own testimony, after defendant entered the taqueria, Johnson and Ware moved away from the door of the restaurant and took shelter in an adjacent loading dock, while Oberzeir was on the sidewalk at the curb when defendant fired at him. Defendant fired one bullet in Oberzeir's direction before aiming and firing at other officers in their vehicles. Defendant contends because he never fired a bullet directly at Johnson or Ware, he could not be guilty of their attempted murder.

As to Officer Barnes, defendant argues insufficient evidence supported the attempted murder charge because he could not have fired more than one bullet at the car

Barnes and Costa were in. The revolver defendant used had a capacity of five rounds. Defendant contends trial testimony showed he had already fired one bullet before the arrival of Liberta, Costa, and Barnes, he then fired three more shots at Liberta's vehicle, and only then aimed toward Costa's car. Defendant contends no rational juror could have concluded Barnes and Costa were in the same line of fire at the exact moment defendant fired *one shot* at their car. Likewise, defendant asserts, no rational juror could have concluded defendant *knew* Barnes was in the passenger seat of Costa's car because Barnes testified he ducked.

Even assuming defendant is correct that there is no substantial evidence he aimed or fired directly at Johnson and Ware, nor that he fired more than one shot at Barnes and Costa's car, such evidence is not required to sustain an attempted murder conviction.[8] In *People v. Ervine* (2009) 47 Cal.4th 745, 786 (*Ervine*), the defendant was convicted of attempted murder of three peace officers, though he did not aim or shoot his gun at one of them, Aldridge. Our high court nonetheless affirmed the conviction for attempted murder of Aldridge, concluding the defendant's strategy of shooting at the other two peace officers "constituted not only attempted murder as to those . . . officers[,] but also a direct but ineffectual act toward killing Aldridge, since the elimination of the threat from [the

[8] Defendant's summary of the evidence in this regard is questionable and arguably ignores the standard of review. (See, e.g. *Smith*, *supra*, 37 Cal.4th at pp. 738–739 [appellate court must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence]; Evid. Code, § 411 [testimony of one witness, if believed, is sufficient to establish fact]; *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction"].) Johnson testified Ware ran to the doorway of the taqueria, Johnson was right behind him, and as Ware was about to enter the taqueria, defendant fired a shot from inside the taqueria, causing Ware to call out, "[H]e's shooting." This testimony arguably supports an inference defendant was aiming or shooting at Ware and Johnson, even if they were able to escape injury. Though defendant argues the video shows Johnson's memory was inaccurate and he was "definitely not 'one step behind' " Ware, the video does not conclusively show where Johnson and Ware were when defendant was shooting from the taqueria. Barnes testified he heard more than one shot after defendant pointed his gun at their car and fired, arguably supporting an inference defendant fired more than one shot at their car.

other officers] would have facilitated the task of killing Aldridge." (*Ibid.*) The evidence in *Ervine* showed the defendant wanted to kill all of the officers at the scene, was outnumbered, and had "undertaken a direct but ineffectual act toward accomplishing the intended killing by firing . . . at the [two] officers who posed the most immediate threat." (*Ibid.*; see *People v. Nelson* (2011) 51 Cal.4th 198, 206, 212–213 (*Nelson*) [pointing gun at attempted murder victim was sufficient to support finding of attempted murder where the defendant was first trying to eliminate threat posed by police officers].)[9]

Here sufficient evidence supported the attempted murder conviction as to all three officers. The record supports an inference defendant did not want to be arrested, feigned surrender, attempted to escape by taking cover in the taqueria, and then fired a gun directly at multiple officers to avoid capture. As to Johnson and Ware, the record shows they, along with Oberzeir, surrounded defendant in front of the taqueria after they realized he was a suspect. They drew their guns and ordered him to the ground. Defendant began to hold his hands up, then ran into the taqueria. Ware, who was about five steps behind defendant, ran after him to the door of the taqueria with Johnson one

[9] As to Officer Barnes, defendant attempts to distinguish this case factually from other cases in which courts have affirmed convictions for attempting to murder two people with one gunshot. (See, e.g., *Smith*, *supra*, 37 Cal.4th at pp. 745–746; *People v. Chinchilla* (1997) 52 Cal.App.4th 683.) Defendant argues unlike in those cases, no rational juror could conclude defendant knew Barnes was in the car because Barnes ducked down and did not see defendant fire the gun, and "physics and geometry make it extremely unlikely" both officers were in the same line of fire when defendant fired in their direction. But Barnes testified defendant turned his weapon from Liberta's vehicle then aimed his weapon at Costa and Barnes while standing 15 yards away. Barnes then ducked, supporting a reasonable inference defendant saw both Barnes and Costa in the car when he first aimed his gun at them. And defendant does not actually claim the two officers were never in the same line of fire, only that they would have been in the same line of fire for a brief moment. (See, e.g., *Smith*, at p. 742 [circumstance that bullet misses its mark is not dispositive—"the very act of firing a weapon ' "in a manner that could have inflicted a mortal wound had the bullet been on target" ' is sufficient to support an inference of intent to kill"].) More significantly, defendant does not address the *Ervine* decision or meaningfully distinguish *Nelson*, both of which affirmed attempted murder convictions under factual circumstances similar to those in this case.

step behind Ware. As Ware was about to enter the taqueria, defendant fired a shot from inside the restaurant. Ware said, "[H]e's shooting," and he and Johnson retreated and took cover in the loading dock. As to Barnes, he testified he saw defendant aim at Liberta's car then at the car he and Costa were in. Barnes ducked and heard more than one shot. Costa testified there were bullet strikes in the building directly across from the vehicle he and Barnes had occupied. The record also reflects defendant stopped shooting at officers only when he ran out of bullets. The jury could reasonably infer from these circumstances that defendant intended to eliminate all of the police officers who posed a threat to his escape, and his shooting at Oberzeir, Liberta, Barnes, and Costa was a direct but ineffectual act toward accomplishing his plan by eliminating the officers that posed the most immediate threat. (*Ervine*, *supra*, 47 Cal.4th at p. 786; *Nelson*, *supra*, 51 Cal.4th at p. 213.) On this record, we conclude substantial evidence supports the attempted murder convictions for Ware, Johnson, and Barnes.

D. Pitchess

Before trial, defendant filed a *Pitchess* motion seeking disclosure of any police personnel records that reflected complaints by any inmate, fellow officer, or private citizen against Officers Oberzeir, Ware, Johnson, Barnes, Costa, and Liberta. The trial court found good cause for discovery of records relevant to dishonesty and fabrication of evidence as to all six officers. On December 9, 2015, the court held an in camera hearing on the *Pitchess* motion.

Under well-established *Pitchess* procedure, a criminal defendant may bring a motion to discover law enforcement personnel records relevant to the defendant's defense. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225–1226.) If the court finds the defendant has shown good cause for the discovery, the court must conduct an in camera hearing to determine if any relevant records must be produced. (*Id.* at p. 1226.) At the hearing, the custodian of records must bring to court all documents " 'potentially relevant' " to the defendant's motion. (*Id.* at pp. 1228–1229.) The trial court must make a record of the documents it examined in ruling on the motion sufficient to permit appellate review. (*Id*. at p. 1229.) The court may photocopy the documents and place

them in a confidential file, prepare a list of the documents it considered, "or simply state for the record what documents it examined." (*Ibid*.) To protect privacy concerns, the hearing transcript and any documents copied for the record must be sealed. (*Ibid.*) On appeal, this court reviews the "record of the documents examined by the trial court" to determine if the trial court abused its discretion in failing to disclose any records. (*Ibid*.)

In his opening brief, defendant asked this court to independently review the sealed records pertaining to the *Pitchess* proceedings to determine if the lower court abused its discretion. The Attorney General did not object to the requested review. We ordered the trial court to provide us with the sealed documents it reviewed in the *Pitchess* proceedings below.

We will not disturb a trial court's ruling on a *Pitchess* motion absent an abuse of discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.) Having independently reviewed the sealed transcript of the *Pitchess* proceeding and the documents reviewed by the trial court, we conclude the court sufficiently complied with proper *Pitchess* procedures and did not erroneously withhold any information. (See *Fuiava*, *supra*, 53 Cal.4th at pp. 646–648.)

E. *Cumulative Error*

Defendant contends the cumulative errors here warrant reversal because they deprived him of his federal constitutional right to a fair trial. Because we find no error, there is no prejudice to accumulate.

III. DISPOSITION

The judgment is affirmed.

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Margulies, J.

We concur:

_____
Humes, P. J.

_____
Banke, J.

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People v. White